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Nos. 87-976, 87-977, 87-979 and 87-1091

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

TEXAS EASTERN TRANSMISSION CORPORATION,
Petitioner,

v.

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Respondent.

CITY OF WILLCOX, ARIZONA AND
ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
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SOUTHERN CALIFORNIA GAS COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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STATEMENT REQUIRED BY RULE 28.1

All of the Respondents joining in this Brief, with the exception of Pennzoil Company and Chevron U.S.A., Inc., joined in the Petition for Certiorari filed in *Shell Offshore Inc., et al. v. Associated Gas Distributors, et al.*, No. 87-978, which sought a writ from *Associated Gas Distribution v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), the same decision which Petitioners in the captioned cases seek to have reviewed by this Court. In Appendix E to that Petition, these parties submitted a statement as required by Rule 28.1. The following statement is submitted on behalf of Chevron U.S.A., Inc. and Pennzoil Company:

CHEVRON U.S.A., INC.

Chevron U.S.A., Inc. is a wholly-owned subsidiary of Chevron Corporation. The non-wholly-owned subsidiaries and affiliates of Chevron Corporation are:

AMAX Inc.
Arabian American Oil Company
Atlas Supply Company
C-W Properties Inc.
Caltex Mediterranean Limited
Caltex Petroleum Corporation
Canyon Reef Carriers, Inc.
Chevron Capital N.V.
Chevron Capital U.S.A. Inc.
Chevron Investment Management Company
Chevron Oil Finance Company
Dixie Pipeline Company
Explorer Pipeline Company
Felix Oil Company
Glenwood Properties
Gulf Oil Finance Company
Kenai Pipe Line Company
Long Beach Oil Development Company
Mid-Valley Pipeline Company

Paloma Pipe Line Company
Pembroke Capital Company, Inc.
Plantation Pipe Line Company
Platte Pipe Line Company
Refineria Petrolera de Guatemala-California, Inc.

PENNZOIL COMPANY

The non-wholly-owned subsidiaries and affiliates of Pennzoil Company are:

National Transit Company
10 Minute Service Centres Limited
The Eureka Pipe Line Company
American Sulphur Export Corporation
Pennzoil (U.K.) Limited
P. T. Sungai Kencana
P. T. Indo Muro Kencana
Proven Properties Inc.

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No. 87-1091

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RESPONDENTS' BRIEF IN OPPOSITION

REASONS WHY THE WRITS SHOULD NOT BE GRANTED

I. The Commission's Orders Below Do Not Impose "Common Carrier Status" Upon Interstate Pipeline Companies.

A. The Commission Has The Power And Duty Under The Natural Gas Act To Prevent "Undue Discrimination."

It is quite clear from Order Nos. 436 and 436-A that the Federal Energy Regulatory Commission ("Commission") did not set out to impose common carrier status upon interstate pipeline companies, and affirmatively found that it had *not* done so.[1] Instead, the Commission established a format for transportation authorizations using its conditioning power contained in Section 7(e) of the Natural Gas Act ("NGA")[2] and Section 311(c) of the Natural Gas Policy Act of 1978 ("NGPA")[3] for issuing certificates of public convenience and necessity to interstate pipelines, thus carrying out the duties imposed upon it by Sections 4(b) and 5(a) of the NGA[4] to prevent undue discrimination by such pipelines. The Commission also required intrastate pipelines which transport gas under Section 311 of the NGPA to do so with-

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[1] J.A. 346-364, 1079-1086; Supplemental Appendix ("Supp. App.") [attached to this Brief] at SA-5 to SA-20, SA-21 to SA-27.

[2] 15 U.S.C. § 717f(e).

[3] 15 U.S.C. § 3371(c) (1982). *See also* H. Conf. Rep. No. 95-1752, 95th Cong., 2d Sess. 7 (1978).

[4] 15 U.S.C. § 717c(b); 15 U.S.C. § 717d(a). *See* INGAA App. 34a ("INGAA App." refers to the appendix submitted with the petitions in Nos. 87-976, 87-977, and 87-979). This Court has broadly construed the Commission's conditioning power under Section 7(c), FPC v. Texaco Inc., 377 U.S. 33 (1964), even where the Commission's only jurisdiction is over transportation by interstate pipelines, FPC v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, 25-30 (1961); Panhandle Eastern Pipe Line Co. v. FPC, 232 F.2d 467, 471 (3rd Cir. 1956), *cert. denied*, 352 U.S. 891 (1956).

out discrimination. The Commission found: (i) that pipelines possess substantial market power;[5] (ii) that they have exercised that power to deny their own sales customers, and others without fuel-switching capability access to competitively-priced gas;[6] and (iii) that this practice had denied consumers access to gas at the lowest reasonable rates.[7] These actions, the court of appeals found, constituted "extreme factual circumstances" showing discrimination, and that the effect of this discrimination was to deny gas users, and the economy generally, the benefits of a competitive wellhead market.[8]

B. The Decision Below Creates No Conflicts Between The Circuits Or With Decisions Of This Court Requiring The Granting Of Certiorari.

Petitioners[9] assert that the decision below creates a conflict between the circuits and is contrary to this Court's decision in *Otter Tail Power Co. v. United States*,[10] because it mandates the equivalent of "wheeling" for natural gas. In *Otter Tail* and several decisions of the courts of appeals,[11] it was held that the Commission lacked the authority to order such "wheeling" of electricity. The Petitioners assert that the decision below is inconsistent with these prior decisions, because the NGA

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[5] J.A. 306; Supp. App. at SA-1 to SA-2.

[6] J.A. 318, 1087; Supp. App. at SA-2 to SA-3, SA-27 to SA-28.

[7] J.A. 318-321, 1087; Supp. App. at SA-2 to SA-5, SA-27 to SA-28.

[8] INGAA App. 30a.

[9] As used herein "Petitioners" means the Petitioners in Nos. 87-976, 87-977, and 87-979.

[10] 410 U.S. 336 (1973).

[11] Florida Power & Light Co. v. FERC, 660 F.2d 668 (5th Cir. 1981), *cert. denied*, 459 U.S. 1156 (1983); New York State Electric & Gas Corp. v. FERC, 638 F.2d 338 (2nd Cir. 1980), *cert. denied*, 454 U.S. 821 (1981); Richmond Power & Light v. FERC, 574 F.2d 610 (D.C. Cir. 1978).

and Federal Power Act ("FPA")[12] are to be read in *pari materia*.[13] Petitioners contend that, given this limitation on the Commission's power to order wheeling, the anti-discrimination provisions of neither act give the Commission the power to require a pipeline to transport gas belonging to another against its will.[14]

This argument ignores a key factor recognized by the court of appeals below. In *Otter Tail*, this Court held that a district court could require wheeling, *where not to require it* would permit the electric company to violate the antitrust laws. This Court affirmed that the enactment of the Federal Power Act did not interpose a defense against an antitrust suit in a district court.

While *Otter Tail* might prove a precedent against a general assertion of jurisdiction by the Commission to impose common carriage, that case does not address the issue presented here, to-wit: whether the Commission may order non-discriminatory transportation as a remedy for anti-competitive conduct or undue discrimination. Here the Commission *made a finding* that the pipelines were engaged in anti-competitive practices by refusing to transport gas belonging to other shippers which would displace sales formerly made by the pipelines themselves.[15] In any event, the Commission did not *order* pipelines to transport gas on behalf of others; on the contrary, it made it very clear that the pipelines could choose *not* to transport for others.[16] What the Commission said

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[12] 16 U.S.C. § 791a, *et seq.*

[13] Contrary to the holding of the court of appeals, *see* INGAA App. 28a.

[14] Texas Eastern Petition (No. 87-977) at 11.

[15] J.A. 1086; Supp. App. at SA-26 to SA-27.

[16] J.A. 352-357, 1085; Supp. App. at SA-10 to SA-15, SA-26.

was, "if you choose to transport gas for others, you must do so on a non-discriminatory basis." [17]

Under this Court's decisions in *FPC v. Conway Corp.*[18] and *Gulf States Utilities Co. v. FPC*,[19] the Commission is *required* to consider the anti-competitive effects of regulated aspects of interstate utility operations, and should it find that those aspects are present, it may take remedial steps to foster competition.

The decisions of the courts of appeals cited by Petitioners do not create a conflict among the circuits requiring this Court's intervention. Indeed, a close reading of these cases suggests that the Commission's power to order wheeling of electricity in the face of a clear showing of anti-competitive conduct has not yet been decided. In *Florida Power*, the Fifth Circuit explicitly pretermitted a decision on such an argument.[20] In *New York State Electric & Gas*,[21] the Second Circuit stated that *were* the Commission to require wheeling as a remedy for an unreasonable contract provision under Section 206 of the FPA, it would be required to use the specific wheeling authorization added by Congress in 1978.[22]

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[17] Such a finding was required by the D.C. Circuit's opinion in Maryland People's Counsel v. FERC, 761 F.2d 780 (D.C. Cir. 1985); J.A. 1086; Supp. App. at SA-26 to SA-27.

[18] 426 U.S. 271, 278-80 (1976).

[19] 411 U.S. 747, 758-59 (1973).

[20] Florida Power & Light Co. v. FERC, *supra*, 660 F.2d at 679.

[21] New York Electric & Gas Co. v. FERC, 638 F.2d at 403.

[22] Section 203 of the Public Utility Regulatory Policies Act of

[22] 16 U.S.C. § 824e. Section 203 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), P.L. 95-617, 92 Stat. 3117, 3136-40, *codified as* Sections 211 and 212 of the FPA, 16 U.S.C. §§ 824j & 824k. The wheeling provisions of Sections 211 and 212 were added by PURPA to deal with the perceived need to assist cogenerators and small power producers. This points out differences between the electric and natural gas industries, which sometimes call for different Commission responses to similar statutory language. (*Cf.* Natural Gas Pipeline Company of America v. FERC, 765

There being no similar specific statutory mechanism in the NGA, *New York State Electric & Gas* cannot be read to preclude the ordering of transportation by interstate pipelines to prevent discrimination.

In *Richmond*, as noted by the court of appeals, the petitioner failed to make a showing of anti-competitive or discriminatory impact resulting from the refusal of other utilities to wheel power.[23] The Commission and the District of Columbia Circuit simply rejected a *per se* rule equating refusals to wheel with discriminatory or anti-competitive practices. In this case, the Commission made express findings of anti-competitive practices. These findings distinguish this case from *Florida Power*[24] and *Richmond*,[25] where no such findings were made. This distinction is clearly articulated in the opinion of the court of appeals.[26]

C. *FCC v. Midwest Video Corp.*[27] And The Other Television Cases Are Not In Point.

All three Petitioners, particularly City of Willcox, rely on *FCC v. Midwest Video Corp.* as controlling authority requiring reversal of the court of appeals and the Commission. We agree with the court of appeals that these cases are distinguishable from the case at bar.

FCC v. Midwest Video Corp. is the last in a series of cases[28] which explored the First Amendment right of

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F.2d 1155, 1167-68 (D.C. Cir. 1985) (discussing "the complex policy questions" which justified the Commission treating abandoned gas projects differently from abandoned electric projects.))

[23] Richmond Power & Light v. FERC, *supra*, 574 F.2d at 623.

[24] 660 F.2d at 679.

[25] 574 F.2d at 623.

[26] INGAA App. 28a-30a. *See also* Central Iowa Power Coop. v. FERC, 606 F.2d 1156 (D.C. Cir. 1979).

[27] 440 U.S. 689 (1979).

[28] FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940); United States v. Southwestern Cable Co., 392 U.S. 157 (1968);

freedom of speech in relation to the Federal Communications Act, and that Act's purpose to preserve a degree of editorial control in the broadcaster or cable operator. In *Midwest Video*, the Court held that in the face of a direct prohibition in Section 3(h) of the Federal Communications Act [29] against "treating broadcasters as common carriers," the Federal Communications Commission could not require a cable television operator to maintain specific channels for the use of the public. No questions of anti-trust violations or anti-competitive activity by the broadcasters were presented. Instead the Court gave effect to the legislative purpose of the Federal Communications Act which was designed to "safeguard the journalistic freedom of broadcasters." [30] In *United States v. Southwestern Cable Co.*, *supra*, this Court had upheld the power of the Federal Communications Commission to prohibit certain anti-competitive actions by a television station, which the Court held did *not* make the station a common carrier.[31] This is similar to the action taken by the Commission and upheld by the court of appeals below.

While conceding that the accomplishment of the purpose intended by Congress is a key element in interpreting the extent of the Commission's jurisdiction,[32] the City of Willcox makes the astonishing assertion that the NGPA "was not intended to promote competition in either the interstate or intrastate pipeline fields." [33]

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); United States v. Midwest Video Corp., 406 U.S. 649 (1972); Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973).

[29] 47 U.S.C. § 153(h).

[30] FCC v. Midwest Video Corp., *supra*, 440 U.S. at 700.

[31] United States v. Southwestern Cable Co., *supra*, 392 U.S. at 169 note 29 (1968).

[32] City of Willcox Petition (No. 87-979) at 12.

[33] *Id.* at 13.

Contrary to the assertion made by the City of Willcox, the Commission's responsibility to consider competitive factors is clear.[34] This Court's decision in *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board of Mississippi*,[35] referred to "Congress' determination that the supply, the demand, and the price of high-cost gas be determined by market forces" in the NGPA.[36] The controlling effect of the "market forces" over prices cannot occur, as the Commission below found, where it is prevented by the anti-competitive actions of interstate pipeline companies.[37] Competition at the wellhead is promoted by the NGPA. Competition cannot be effective at the burner tip unless pipelines are prevented from discriminating in favor of their own gas supplies in delivering gas to the ultimate consumer.

In the *Maryland People's Counsel* cases,[38] the District of Columbia Circuit reversed the Commission's earlier efforts to insert competition into sales at the market end of interstate pipelines, on the grounds that it did not go far enough in ensuring that *all* pipeline customers could take advantage of the newly available supplies.[39] Those

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[34] Central Iowa Power Coop. v. FERC, 606 F.2d 1156, 1162 (D.C. Cir. 1979); Central Power & Light Co. v. FERC, 575 F.2d 937, 938 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 981 (1978); Gulf States Utilities Co. v. F.P.C., 411 U.S. 747 (1973).

[35] 474 U.S. 409 (1986). *See also* Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973).

[36] Transcontinental Gas Pipe Corp. v. State Oil and Gas Board of Mississippi, *supra*, 474 U.S. at ——; 106 S.Ct. at 717, 88 L.Ed.2d at 744. *See also* Public Service Commission of New York v. Mid-Louisiana Gas Co., 463 U.S. 319, 331-32 (1983).

[37] J.A. 1087; Supp. App. at SA-27 to SA-28.

[38] Maryland People's Counsel v. FERC, 761 F.2d 768 (D.C. Cir. 1985); Maryland People's Counsel v. FERC, 761 F.2d 780 (D.C. Cir. 1985); Maryland People's Counsel v. FERC, 768 F.2d 450 (D.C. Cir. 1985).

[39] 761 F.2d at 788-89.

cases specifically directed the Commission to consider competitive factors, finding that this Court's instruction in *Atlantic Refining Company v. Public Service Commission* required the Commission to "afford consumers a complete, permanent and effective bond of protection from excessive rates and charges," [40] and that competition was one way of achieving this result.[41] Order No. 436 was the Commission's response to the mandate of the District of Columbia Circuit in the *Maryland People's Counsel* cases.[42] The court below found the Commission's response to be reasonable.[43]

D. The Orders Below Do Not Force Interstate Pipelines To Become Common Carriers.

1. *Pipeline Participation In The Order No. 436 Program Is Voluntary.*

The Commission repeatedly stated that participation in the Order No. 436 open-access transportation program was voluntary on the part of the interstate pipeline, and if the pipeline chose to continue operations as before, it could do so.[44] The Petitioners assert that in reality pipelines are forced to participate in the program or lose out on the competitive market to other pipelines who are willing to accept the drawbacks of the program in return for its advantages. Petitioners refer to the statement of the court of appeals that "inability to provide blanket certificate transportation for fuel-switchable users may in current market circumstances cause critical load loss," [45] forcing the pipelines into a choice between being

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[40] 360 U.S. 378, 388 (1959).

[41] 761 F.2d at 777.

[42] J.A. 356-357, 1086; Supp. App. at SA-13 to SA-15, SA-26 to SA-27.

[43] INGAA App. 31a-34a.

[44] J.A. 355-356, 1082-1086; Supp. App. at SA-12 to SA-14, SA-23 to SA-27.

[45] INGAA App. 81a.

shot and hanged.[46] Any adverse consequences to the pipeline of continuing to operate as it did before Order No. 436 are the result of market forces, not of Commission action "forcing" that pipeline to become a common carrier. As the court of appeals observed, "nothing bars the Commission from devising rules that remedy a lack of competition by exposing pipelines to competition and its normal consequences."[47] This Court held in *Market Street Railway v. Railroad Commission*, that regulation was not designed to protect regulated companies from losses brought about by market conditions.[48]

As the Commission noted in the Orders below, Order No. 436 "does not direct or 'mandate' a pipeline to do anything."[49] It only requires that when a pipeline *does* choose to transport on a self-implementing basis, it must provide those transportation services in a non-discriminatory manner.[50] A pipeline remains free to seek authorization for other transportation not covered by the condition and the Commission will review such requests on a case-by-case basis.[51]

The Commission pointed out the "all important distinction" between common carriage and the Order No. 436 open-access transportation program—the fact that the pipeline continued to have the option to provide transportation services under NGA Section 7 certificates, and a pipeline could cease transporting under the Order No. 436 program and revert to its former status.[52] Unlike

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[46] *Id.*; *See* Texas Eastern Petition (No. 87-977) at 8.

[47] INGAA App. 32a-33a.

[48] 324 U.S. 548, 566-67 (1945).

[49] J.A. 1082-1083; Supp. App. at SA-23 to SA-24.

[50] *Id.*

[51] *Id.*

[52] J.A. 1085; Supp. App. at SA-26.

the mandatory common carriage proposals considered by Congress but not enacted,[53] the Order No. 436 open-access program effectively allows the pipeline the discretion to determine whether or not to become a transporter of gas belonging to others.[54]

The Commission's open-access program was found to be necessary to prevent an interstate pipeline from engaging in the unduly discriminatory practice of refusing to transport gas for others where to do so would displace its own sales.[55] In order to avoid the unlawful discrimination which the District of Columbia Circuit warned against in the *Maryland People's Counsel* cases, *supra*, the pipeline was required to choose one of three alternatives:

> (i) It could refuse to transport gas belonging to others at all.
>
> (ii) It could transport gas for others under individual certificates issued pursuant to Section 7 of the NGA.
>
> (iii) It could transport gas under the blanket certificates authorized by Order No. 436 *provided it agreed to do so without discrimination.*

Moreover, the pipeline can change its mind and shift from one role to another. While the pipeline might obtain some commercial advantage out of accepting the Order No. 436 blanket certificate, it is certainly not required by the Commission's Order to do so. By no stretch of the imagination does this rise to the level of imposing mandatory common carriage upon the interstate pipelines.

2. Non-Discrimination Is Not Common Carriage.

All three Petitioners make the unwarranted assumption that because the Order No. 436 transportation re-

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[53] INGAA Petition (No. 87-976) 9-10; City of Willcox Petition (No. 87-979) at 12-15; Texas Eastern Petition (No. 87-977) at 6-8.

[54] J.A. 1085; Supp. App. at SA-26.

[55] *Id.*

quires pipelines *which elect to transport under blanket certificates* to do so without discrimination on a first-come, first-served basis, that the Commission has imposed "common carrier status" upon them.[56] But the imposition of one of the attributes of common carriage as a condition to the non-compulsory participation in a particular transportation program does not confer "common carrier status" on interstate pipelines.[57] This distinction is clearly made in *FCC v. Midwest Video Corp., supra.*[58] The NGA, as distinguished from the Federal Communications Act, contains no prohibition against imposing "common carrier obligations" upon interstate pipelines in limited circumstances where the failure to do so would result in undue discrimination, which is directly prohibited by the NGA.[59]

E. Order No. 436 Does Not Violate Section 602(b)(2) Of The NGPA.[60]

Petitioners[61] assert that Order No. 436 violates the provisions of Section 602(b)(2) of the NGPA which provide in pertinent part:

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[56] INGAA Petition (No. 87-976) at 7; City of Willcox Petition (No. 87-979) at 5-6; Texas Eastern Petition (No. 87-977) at 5-6.

[57] The *NARUC* cases (National Ass'n of Regulatory Utilities Comm'n v. FCC, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied,* 425 U.S. 992 (1976); National Ass'n of Regulatory Utilities Comm'n v. FCC, 533 F.2d 601 (D.C. Cir. 1976)) cited by City of Willcox at 9 are not in point. The District of Columbia Circuit noted in *NARUC II* "a carrier will not be a common carrier where its practice is to make individualized decisions in particular cases whether and on what terms to serve" (533 F.2d at 608-09). Under Order No. 436, an interstate pipeline has the option to commence or discontinue open-access transportation.

[58] 440 U.S. at 701-02.

[59] INGAA App. 26a-27a.

[60] 15 U.S.C. § 3432(b). This Section is entitled "Effect on state laws" which supports the court of appeals' conclusion as to its purpose, *see* INGAA App. 34a-37a.

[61] City of Willcox Petition (No. 87-979) at 10; INGAA Petition (No. 87-976) at 15; Texas Eastern Petition (No. 87-977) at 9.

> No person shall be subject to regulation as a common carrier under any provision of Federal or State law by reason of any transportation—
>
> . . . .
>
> (2) authorized by the Commission under Section 311(a) of this Act.

The short answer to this argument is that neither under Order No. 436 nor any other Order has the Commission subjected interstate pipelines "to regulation as a common carrier."[62] Petitioners confuse the limited imposition of one of the obligations of a common carrier, only where the pipeline elects to transport under the Order No. 436 program and only where necessary to prevent discrimination and monoplistic practices, with "regulation as a common carrier." The discussion of this argument by the court of appeals defends both its interpretation and that of the Commission:[63]

> The reasonableness [of FERC's interpretation of § 602(b)(2)] is underscored by FERC's broad duties to assure consumers access to natural gas at prices such as would prevail in the absence of pipeline market power and its conclusion that under the present circumstances fulfillment of that duty required such conditioning. *Cf. American Trucking Ass'n, Inc. v. Atchison T. & S.F. Ry. Co.*, 387 U.S. 397 (1967). . . .[64]

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[62] The Commission so found, (J.A. 1084; Supp. App. at SA-25) and the court of appeals agreed (INGAA App. 35a-39a).

[63] INGAA App. 35a-39a.

[64] INGAA App. 37a.

II. The Optional Expedited Certificate Procedure Established By The Commission's Orders Represents A Valid Exercise Of The Commission's Authority And Contains Provisions Which Are Not Ripe For Review.

A. The Optional Expedited Certificate Procedure's Substantive Provisions Are Within The Commission's Discretionary Authority And Will Not Interfere With State Jurisdiction.

Southern California Gas Company ("SoCal") seeks review of the Optional Expedited Certificate Procedure ("OECP") on grounds that, in adopting the "rebuttable presumption" comprising the heart of the rule, the Commission abdicated its responsibilities under the NGA, neglected to consider the risk of duplicative or wasteful facilities, and failed to adequately consider the potentially adverse impact which "LDC bypass" [65] may inflict on the local distribution companies' customers. To the contrary, however, both the Commission, in Order Nos. 436 and 436-A, and the court of appeals fully considered all relevant factors and determined that the provisions of the OECP minimized any potentially adverse impact while adequately discharging the Commission's statutory responsibilities. Recognizing Congress' primary objective in enacting the NGA's certificate requirement is to avoid ratepayer subsidization of duplicative or economically wasteful projects and decisions, the Commission structured the OECP so as to guard against "risk-shifting" to pipeline customers and the public.[66] Additionally, the Commission designed the OECP so that, once an applicant has initially met *prima facie* criteria showing that it will

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[65] "LDC bypass" involves situations where an end-user secures pipeline transportation of natural gas purchased directly from producers and other gas merchants thereby bypassing the local distribution company servicing the area in which the end-user is located. SoCal App. at C-108 ("SoCal App." refers to the appendix submitted with the petition in No. 87-1091).

[66] INGAA App. at 112a.

assume the full economic risk of the venture, local distribution companies, customers and other affected parties may, through a challenge to the applicant's factual showing raising relevant offsetting factors, prompt evaluation of any potential impact on competition.[67] Finally, through an economic and regulatory analysis of "LDC bypass" and its pro-competitive effects, both the Commission and the court of appeals concluded that any adverse impact to local distribution companies or their customers is a function of, and may be minimized by, the policies and practices of state regulatory agencies.[68] The Commission's choice of procedures to discharge its responsibilities under Section 7(c), resting on careful and reasoned analysis, is within its discretion to make and cannot be viewed as arbitrary and capricious.[69]

SoCal's claims that the OECP creates a "regulatory gap" and interferes with state jurisdiction likewise have no merit. SoCal argues that, since the OECP fails to allow a meaningful review of bypass applications, the absence or uncertainty surrounding state regulation to adequately handle bypass means that the OECP must fail. These arguments, however, fail to discern the interrelationship between federal and state authority and ignore the fact that the OECP will continue to allow the Commission and state regulatory agencies to continue to act within their respective spheres of authority. Regardless of whether the Commission discharges NGA jurisdiction through the traditional certificate process or the OECP, the scope of the Commission's authority remains well defined and is intended to supplement state author-

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[67] SoCal App. at C-111, C-121 and D-77.

[68] SoCal App. at C-108, C-109, D-76, D-77; INGAA App. at 106a-107a.

[69] Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983), *quoting* Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962).

ity.[70] The court of appeals recognized this bright-line delineation of authority in stating that the "Commission fulfills its mission under the [NGA] if it establishes conditions by which gas arrives in the hands of consumers or LDCs on terms that conform to the Act." [71] Viewed in these terms, the OECP neither expands nor restricts the scope of complementing state authority to regulate the "LDC bypass."

B. The Optional Expedited Certificate Procedural Provisions Are Not Ripe For Review.

In contrast to issues concerning the Commission's authority to adopt the OECP, the court of appeals correctly determined that SoCal's complaints as to the procedural aspects of the rule are not sufficiently ripe for review.[72] In addition to directly challenging the Commission's authority to streamline the traditional certificate process, SoCal attempts to raise a number of attacks on the procedural aspects of the OECP's presumption provisions which the court of appeals characterized as "highly abstract and speculative." [73] Review by this Court at this time is premature at best and should be deferred pending a final formulation of the Commission's optional certificate regulations.

It is clear that SoCal's complaints concerning the procedural provisions of the OECP are only theoretical and

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[70] FPC v. East Ohio Gas Co., 338 U.S. 464 (1950). *See* H.R. Rep. No. 709, 75th Cong., 1st Sess. 2 (1937).

[71] INGAA App. at 108a. Whether and the extent to which states may regulate "LDC bypass" or interstate gas sales to end-users is a separate question which has no direct bearing on the scope of the Commission's NGA-based authority over pipeline transportation. *See, e.g.*, Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission, 341 U.S. 329 (1951); Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, 332 U.S. 507 (1947).

[72] INGAA App. at 97a-102a.

[73] INGAA App. 100a-101a.

speculative at this juncture. Thus, review by the Court would result in a premature adjudication in the nature of an advisory opinion.[74] As the court of appeals acknowledged below, the procedural issues raised by SoCal has not yet been addressed by the Commission or the courts in a specific factual context.[75] Since these issues, including specifically the effect of the "rebuttable presumption," can be contested and reviewed in specific proceedings before the Commission, the OECP in its present form does not present issues which are fit for judicial decision and no hardship to SoCal can result from withholding a generic and abstract consideration of the OECP at this time.

CONCLUSION

The Petitions for Certiorari in Nos. 87-976, 87-977, 87-979 and 87-1091 should be denied.

Respectfully submitted,

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[74] Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

[75] INGAA App. at 100a-101a.

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SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX

EXCERPTS FROM ORDER NO 436

[JA 305]

• • • •

An interstate pipeline, however, seeking to sell gas from its system supply (a commingled stream of gas that was at the wellhead both NGA-jurisdictional and NGA-non-jurisdictional) is subject to the full panoply of statutory regulation governing market entry, market exit and price. As a result, *even for already certificated sales to existing customers*, it may change its rates only upon 30 days advance notice. It must supply extensive documentation detailing each and every source of natural gas supply, including an identification of the seller, the location, and the price. If it seeks to provide a new service to an existing customer, it must file for and obtain a section 7(c) certificate authorizing the new service. Any party opposing the new market entry has a right to explore genuine issues of material fact in a contested, trial-type hearing.

The rationale for maintaining utility-type market entry, exit, and price regulation over the sales for resale of interstate pipelines while removing that regulation for similar sales by other market entities is only implicit in tne NGPA but appears plain enough: While Congress concluded that gas production was [JA 306] sufficiently competitive to remove regulation, the control which interstate pipelines exercised over transportation still conferred on them the same kind of market power over their customers as had existed at the time of enactment of the NGA.[39]

If customers had access to transportation for gas which they purchase directly in the competitive, commodity market, the pipeline would find itself at a serious competitive disadvantage in marketing gas in competition with

producers and other entities because the regulatory rules as to market entry, exit and price would deprive it of the flexibility to meet the competition. We have *already* seen a good deal of that with the development of the spot market, the resulting decline in pipeline sales and increased use of transportation. And with the advent of repeated out-of-cycle PGA filings, we have seen what may be the beginnings of a virtual "posted price" approach to gas at the resale end where pipelines compete against other pipelines.[40]

Yet a pipeline that accepts the open access condition tendered in the final rule will have agreed to provide its customers with that access, thereby accelerating the process. This would thus require those pipelines that wish to remain merchants to seek greatly increased pricing flexibility.

• • • •

[JA 318]

5. The pipelines have generally expressed a reluctance to provide these transportation services on a nondiscriminatory basis to their existing sales customers[88] or to customers without immediate fuel-switching capability, such as residential and commercial consumers.[89]

   a. With respect to incremental volumes (*i.e.*, gas that would not displace a sale by the pipeline itself from its own contracted-for supply), pipelines generally do not have adequate incentives to provide this service as long as the pipeline's rate structure requires the crediting to the pipeline's sales customers of essentially all revenues received from the transportation. The regulations allowed the pipeline to elect an option pursuant to which costs would be allocated to the transportation service (allowing retention of the revenues), but until fairly recently most major pipelines had not elected that option.[90] Moreover,

the pipelines have been under no legal obligation to elect the revenue retention option. Once pipelines began to design their rates to allocate costs to the transportation service, thereby obtaining the right to retain revenue, the ratemaking rationale for declining to transport incremental volumes has diminished.

[JA 319]

b. With regard to volumes of gas that would displace a sale by the pipeline from its own contracted-for supply, the situation has been somewhat more complex.

(i) Where the pipeline's take-or-pay exposure was so great that it believed that prepaid gas would never be able to be "made up," the pipeline faced the possibility of forfeiting the entire principal amount of the prepayment. Under these economic circumstances, even where the pipeline was able to retain the revenues received from providing transportation, the pipeline would still lose money were it to transport gas that would displace a unit of contracted-for gas. The more gas it transported, the more money it would lose. Under these circumstances the pipeline's reluctance to transport was at its height. Accordingly, it is important to provide flexibility for pipelines and producers to renegotiate these contracts, to review "buy-outs," "buy-downs" and to provide for expedited treatment of limited term and permanent producer abandonment and certificate requests.

[JA 320]

(ii) Where the pipeline's take-or-pay exposure was *not* so great as to confront it with the

prospect of forfeiting prepayments, the question was more one of fixed cost allocation. If the pipeline had to finance the prepayments, who should bear the burden of the carrying charges, the fixed costs associated with the prepayment: the sales customers, the transportation customers, the producer (by not being paid in accordance with the contract), or the pipeline's shareholders?

6. As a result of the pattern of contractual arrangements developed by the industry during previous eras of pipeline expansion [91] and supply curtailment,[92] such as take-or-pay and minimum bill provisions,[93] customers of pipelines have been allocated a large part of the risk that gas supplies deregulalated by the NGPA might prove unmarketable over the life of contracts signed by producers and pipelines.

In turn, the Commission's administration of its ratemaking and certificate obligations under the NGA [94] has impeded the ability of natural gas consumers to secure the rewards of competition in natural gas markets commensurate with the risks [JA 321] that have been allocated to them by pipelines and producers.

In particular, the Commission's policy of full rolled-in pricing of price-controlled and deregulated gas supplies has frustrated the transmission of clear and accurate price signals between the city-gate and the wellhead,[95] and has permitted pipelines to bid up new gas prices above market-clearing levels.[96]

The Commission's policy of discouraging the flexible entry and exit of new pipeline services from natural gas markets is thwarting the expansion of the interstate pipeline system in order to provide

for changing end-uses of gas[97] and changing locations of new gas fields.[98]

7. As a result, average delivered prices of gas are not adjusting downwards in line with the decline in field prices,[99] and this failure is causing unnecessarily high energy costs to consumers and a very large loss to the American economy in jobs, production, and net economic efficiency.[100]

* * * *

[JA 346]

2. *Commission authority to prescribe the non-discriminatory access condition.*

   a. *Authority to impose on interstate transportation by interstate pipelines.*

The proposed rule provided that self-implementing transportation authorizations under section 311 of the NGPA and blanket transportation certificates issued under section 7 of the NGA would be subject to an express non-discriminatory access condition. The express condition provided that any interstate or intrastate pipeline that provides any transportation service pursuant to such authority or certificate shall provide such service for all shippers willing to pay the applicable tariff rate on file with the Commission for the service requested, without discrimination in the quality of service provided, the categories, prices, or volumes of natural gas transported, customer classification, or discrimination of any kind.

[JA 347]

Comments

Some commenters misunderstood the non-discriminatory access condition to require that *all* self-implementing transportation requests, including patently unreasonable requests, be accepted by transporters.[6]

Commission Response

This was not the Commission's intent. Therefore, the non-discriminatory access condition has been revised in the final rule to insert the word "undue" to track the NGA statutory standard.[7] The final rule thus is intended to prohibit undue discrimination, or preference, including but not limited to undue discrimination or preference in the quality of service; duration of service; categories, prices, or volumes of gas transported (including as between affiliated and non-affiliated producers or shippers); and customer classification (including whether or not transportation would displace sales to an existing sales customer of the transporting pipeline).

Moreover, the final rule expressly provides that a pipeline may impose reasonable operational conditions on any request for self-implementing service. See sections 284.8 (c) and 284.9(c). Such conditions are required to be made a part of the pipeline's tariff, however, and thus will be subject to public scrutiny and Commission review. *Id.*

Comments

Most of the commenters who address the non-discriminatory access conditions support the Commission's proposal. Those in [JA 348] favor of the proposal include a quarter of the major interstate pipelines, nearly half the intrastate pipelines, a majority of local distribution companies (LDCs) and virtually all industrial end-users, producers and public entities. The majority of interstate and intrastate pipelines oppose the proposal.[8]

Those in favor of the non-discriminatory access condition generally state that it is necessary in order to effectuate the consumer protection and competition goals of the NGA and NGPA. They assert that it is reasonable in light of the increased demands for transportation of lower-priced gas in natural gas markets, and that it should be clearly stated and broadly applied in order to

avoid evasion by pipelines on a case-by-case basis. They conclude that the Commission has legal authority to impose the condition.

The majority of commenters support the application of the non-discriminatory access condition to pipelines that choose to participate in the Commission's self-implementing transportation programs. They generally indicate the view that the Commission has sufficient authority to implement the non-discriminatory access condition under both NGA section 7(e), which grants the Commission authority to attach reasonable conditions to certificates, and NGA sections 4(b) and 5(a), which prohibit undue discrimination or preference in rates, charges, or practices.[9]

Among the cases cited in support of the Commission's authority under the NGA to impose the non-discriminatory access condition [JA 349] are: *Gulf Oil Corporation v. FPC*, 563 F.2d 588, 596-97 (3rd Cir. 1977) and *American Trucking Association, Inc. v. Atcheson, Topeka, & Sante Fe Railway Company*, 387 U.S. 397 (1967). Process Gas Consumers Group (PGC) also cites several cases in which the courts have read NGA section 7 very broadly to uphold certificate conditions imposed by the Commission; *Atlantic Refining Company v. PSC*, 360 U.S. 378 (1959); *Transcontinential Gas Pipeline Co. v. FERC*, 589 F.2d 186, 190 (5th Cir. 1979), *cert. denied*, 445, U.S. 915 (1980) (conditioning of certificates to ensure appropriate allocation of risk); and *Alabama-Tennessee Natural Gas Co. v. FPC*, 203 F.2d 494 (3rd Cir. 1953) (imposition of rate conditions).

The main argument of the commenters that oppose the non-discriminatory access provision is that the condition would, in effect, subject interstate and intrastate pipelines to regulation as common carriers.[10] According to these commenters, while participation in the self-implementing program may be voluntary, participation

for all practical purposes is mandatory because pipelines will be forced by economic and competitive necessity to participate in the program in order to remain financially viable. Others argue that the non-discriminatory access provision could have the effect of imposing increased costs on customers, such as take-or-pay costs when transportation displaces sales.[11]

Furthermore, these commenters argue that the Commission does not have legal authority to apply the condition to either certificates issued under section 7 of the NGA or self-implementing transportation authorized under section 311 of the NGPA.

[JA 350]

Several of the commenters point to the legislative history of the NGA in support of their view that the Commission is abusing its section 7 conditioning authority in attempting to do indirectly that which Congress has expressly declined to give the Commission authority to do directly, i.e., make pipelines common carriers.[12] These commenters point to the express omission of common carrier authority in the legislative history of both the NGA and NGPA, as well as several legislative proposals to impose non-discriminatory access or express common carrier requirements on natural gas pipelines which have been introduced in Congress but not enacted since enactment of the NGA.[13]

For example, Panhandle Eastern Pipe Line notes that there has been but one exception to what it perceives as Congress' long-standing reluctance to legislate common carriage by natural gas pipelines. That exception is the requirement in the Outer Continental Shelf Lands Act of 1978, 42 U.S. §§ 1334(e) and (f), that natural gas pipelines to which the Secretary of the Interior has granted authority to transport Outer Continental Shelf (OCS) gas must provide transportation on a non-discriminatory basis. Panhandle reasons that the absence

of a similar provision in the NGA and NGPA demonstrates that Congress concluded that the Commission should not have the authority to require that pipelines authorized to transport natural gas under those Acts do so in a non-discriminatory manner.

[JA 351]

Intrastate pipelines and their state regulatory bodies assert that the access condition is an unsupportable attempt to pre-empt state regulation of intrastate activities.[14]

Commission Response

In considering those comments that suggest the Commission lacks legal authority to apply the non-discriminatory access condition to interstate transportation under the NGA the Commission has reviewed the requirements of the NGA, including legislative history and relevant case law.

Section 7(e) of the NGA states, in pertinent part, that:

> The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

According to the Supreme Court:

> The Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges . . .
>
> . . . In view of this framework in which the Commission is authorized and directed to act, the initial certification of a proposal under §7(e) of the Act as being required by the public convenience and necessity becomes crucial. This is true because the delay

> incident to determination in § 5 proceedings through which initial certificated rates are reviewable appears nigh interminable.[15]

Thus, the Commission's certificate and conditioning authority is the means by which it effectuates the purpose of the NGA to underwrite just and reasonable rates to the consumers of natural gas.[16] Any attack on a condition in a certificate issued by the Commission must confront the well-established principle that **[JA 352]** generally the Commission has extremely broad authority to condition certificates of public convenience and necessity.

This broad conditioning authority must be examined in the context of Congress' consideration of the NGA itself. It is abundantly clear from the history of the Act and from the events that prompted its adoption that Congress considered the natural gas industry to be heavily concentrated and that monopolistic forces were determining the amount of natural gas that could be marketed by fixing the amount that could be transported.[17]

Thus, section 7(e) of the NGA gives the Commission the power to attach conditions to certificates where required by the public convenience and necessity.

Beyond section 7, however, sections 4 and 5 of the NGA also prohibit unduly discriminatory or preferential practices by natural gas companies. The Commission has determined that the practice of restricting access to transportation is unduly discriminatory and preferential; and, importantly, has prevented consumers from obtaining the lowest reasonable rates for both transmission services and gas costs. Therefore, the Commission intends the final rule to be an exercise of its conditioning authority to effectuate the non-discrimination requirements of the Act and to ensure that consumers will obtain gas and transportation at just and reasonable rates.

Given the breadth of our section 7 conditioning authority and our obligation under sections 4 and 5, we must ask whether the proposed non-discriminatory access condition is so broad as **[JA 353]** to impose, either directly or indirectly, common carrier obligations on pipelines in violation of the NGA.

Notwithstanding the basis of the condition in sections 4, 5 and 7 of the NGA, several commenters have asserted that Congress failed to enact amendments to the NGA which would have imposed mandatory transportation requirements on natural gas pipelines, and therefore the NGA by implication does not authorize the Commission to impose common carrier status on pipelines.[18]

Of key interest to the Commission in its review of the legislative history are sections 303 and 304 of Title III of H.R. 5423 introduced in 1935 by Representative Sam Rayburn, Chairman of the House Committee on Interstate and Foreign Commerce.[19]

Sections 303 and 304 of H.R. 5423 provided in pertinent part (emphasis added):

> Section 303(a). *It shall be the duty of every distributor to* furnish natural gas, to exchange natural gas with, and *transmit natural gas for any person* upon reasonable request therefor; and to furnish and maintain such services and facilities as shall promote the safety, comfort and conveniences of all its customers, employees, and the public, and shall be in all respects adequate, efficient and reasonable . . .
>
> Section 304. Whenever the Commission after notice and opportunity for hearing finds such action necessary or desirable in the public interest, *it may by order direct a distributor* to make additions, extensions, repairs, or improvements to or changes in its facilities, to establish physical connection with the facilities of one or more persons, to permit those

> of its facilities by one or more persons, or utilize the facilities of, sell natural gas to, purchase natural gas from, *transmit natural gas for*, or exchange natural gas with *one or more other persons* . . . [T]he **[JA 354]** Commission may prescribe the terms and conditions of the arrangement to be made between such persons, including the apportionment of reimbursement reasonably due to any of them.[20]

If these sections would have imposed common carrier obligations on natural gas pipelines, and therefore were rejected by Congress, a principal attribute of common carrier status must be its *mandatory* nature. Thus, section 303 would have imposed an affirmative "duty" on pipelines to "transmit" natural gas "for any person." Section 304 would have provided the Commission with the concomitant authority to "by order direct" any pipeline to "transmit natural gas for . . . one or more other persons . . . ."

Sections 303 and 304 must be read in the context of sections 4(b) and 5(a) of the NGA as enacted. In contrast to proposed section 303's affirmative duty, section 4(b) flatly prohibits "any undue preference or advantage" and "any reasonable difference" in service or as between classes of service. In contrast to proposed section 304's discretion to *order* transportation, section 5(a) contains *no express authority to order transportation.* Instead, section 5 permits the Commission to find that "any rule, regulation, practice or contract" affecting transportation rates, charges or classifications is ". . . unduly discriminatory, or preferential" and thereafter fix prospectively by order the "just and reasonable . . . rule, regulation, practice or contract" to be observed.

On the one hand, sections 303 and 304 would have imposed an affirmative duty on pipelines to transport for others and backed **[JA 355]** up that duty with discretionary authority on the part of the Commission to order such transportation.

On the other hand, sections 4, 5, and 7 of the NGA attach non-discrimination obligations to the "practices" of pipelines and back up those obligations with broad conditioning authority on the part of the Commission. But the Natural Gas Act does not expressly *require* pipelines to transport for others as an affirmative duty.

We have considered whether the non-discriminatory access condition in the final rule amounts to a "direction" or a "mandate" to pipelines to transport for others as an "affirmative duty." First, the condition is just that: a *condition* on the certification or authorization of certain self-implementing transportation services which a pipeline may *voluntarily choose to perform or not*, strictly at its own option. Thus, it does not "direct" or "mandate" a pipeline to do anything. Second, the condition, even when accepted by a pipeline as part of its self-implementing transportation program, does not impose any "affirmative duty" on a pipeline to transport. It only requires that when a pipeline *does* choose to transport on a self-implementing basis, it must provide those transportation services in a non-discriminatory manner. Nor does the condition cover all transportation services and thus operate as mandatory *in effect*. A pipeline remains free to seek authorization for other transportation programs not covered by the condition and the Commission will review them on a case-by-case basis.

[JA 356]

In addition, the condition expressly applies, verbatim, the statutory prohibitions on unduly discriminatory or preferential practices, rates or charges imposed by Congress when it enacted sections 4 and 5 of the NGA.[21]

The Commission need not decide in this rulemaking whether it may ever order transportation on a mandatory basis. The Commission plainly has broad powers to enforce the congressional directives and these powers are at their height when the Commission is fashioning a

remedy for a violation of the statute or an existing regulation. *Niagara Mohawk Power Co. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967). But while these powers may be available in appropriate cases, there is no need to test their scope here, where the regulatory obligations are voluntarily assumed.[22] Further, the condition only applies with regard to each of the individual types of transportation service offered and does not cover transportation under existing individual section 7 certificates or new individual section 7 certificates filed outside of the optional expedited certificate procedure.

Judicial recognition of the Commission's authority to impose the non-discriminatory access condition has already been indicated in the companion cases *Maryland Peoples Counsel v. FERC*, Nos. 84-1019 and 84-1090 (D.C. Cir. 1985). In those cases, the court vacated Columbia Transmission Company's special marketing program and the Commission's rule allowing pipeline transportation for certain industrial end-users. In both instances, the court found the Commission had not justified the programs to the extent they **[JA 357]** allowed pipelines to transport gas to some customers without requiring pipelines to furnish the same service to all customers on non-discriminatory terms.

In its order on the blanket certificate program (No. 84-1090), the court noted, *id*, at n.19, that MPC's plea that blanket transportation certificates be conditioned on non-discriminatory access accords with the recommendation of the Department of Energy: "To achieve the benefits of a properly developed spot market for natural gas . . . FERC should use its authority over natural gas transportation to require pipeline companies to provide carriage on a non-discriminatory basis whenever there is idle pipeline capacity." DOE Report, *supra*, p. 3, at 82. The court further noted that the Commission does not question that it has such authority, *citing Tennessee Gas Pipeline Co. v. FERC*, 689 F.2d 212, 214-15 (D.C. Cir.

1982); *Transcontinental Gas Pipe Line Corp. v. FERC*, 589 F.2d 186, 190 (5th Cir. 1979) (invoking "the well-established principle that generally the Commission has extremely broad authority to condition certificates of public convenience and necessity"), *cert. denied*, 445 U.S. 915 (1980).

Finally, we view section 311(c) of the NGPA as conferring sufficient authority to require a comparable condition under transactions authorized under that statute. The effect of NGPA section 602(b) is discussed below.

[JA 358]

b. *Authority to impose on interstate transportation by intrastate pipelines.*

Comments

Intrastate pipelines and state regulatory commissions cite the NGPA section 602(b) prohibition on common carrier status for section 311 transporters as an absolute ban on application of the non-discriminatory access condition to their operations.[23] They also state that the condition is illegal under NGPA section 601(a)(2)(A), which exempts transportation by intrastate pipelines under section 311(a) of the NGPA from Commission jurisdiction for purposes of section 1(b) of the NGA.[24]

These intrastate pipelines perceive the access conditions as a back door through which the Commission may intrude on their non-section 311, purely intrastate activities. They fear that the non-discriminatory access requirements ultimately will result, if they agree on any section 311 transportation, in more and more of their capacity being obligated to section 311 transportation. Consequently, they assert, the capacity available for intrastate activities would diminish, threatening their viability in the intrastate market. Further, the rate charged by a pipeline in each new section 311 trans-

portation arrangement would be subject to regulation by the Commission under the proposed rule. Therefore, intrastate pipelines, as well as many state regulatory agencies, view the non-discriminatory access condition as an indirect but substantial threat by the Commission to preempt state [JA 359] authority over intrastate pipeline activities. These commenters argue that the non-discriminatory access provision, therefore, violates NGPA sections 601(a)(2)(A) and 602(b).

Commission Response

The Commission has absolutely no intention of regulating intrastate transportaton of natural gas. Rather, the intent of the proposed rule was simply that the same non-discriminatory access condition should apply to all transportation in interstate commerce, whether by an entity subject to FERC jurisdiction under the NGA or to other entities allowed by the Commission under the NGPA to engage in such interstate commerce without becoming subject to the NGA.

Several changes have been made in the final rule to clarify this intent. First, there is no requirement that intrastate pipelines under section 311 provide such transportation service on a firm basis. See section 284.8(a)(ii). Firm transportation is not prohibited, however. In the event an intrastate pipeline offers firm transportation then section 284.8(b) requires that it provide "such" service on a non-discriminatory basis.

Similarly, if an intrastate pipeline offers interruptible interstate transportation (under section 284.(a)(ii)), the only obligation is to provide "such" interruptible service on a non-discriminatory basis. See section 284.9(b).

Thus, the final rule completely avoids the situation whereby an intrastate pipeline is required to offer firm service for out-of-state shippers, thus, progressively being turned into [JA 360] an interstate pipeline against

its will and against the will of the responsible state authorities.

With regard to the rate conditions of section 284.7, the proposed rule would have required intrastate pipelines to comply with the same conditions. The final rule makes it clear that the rate conditions of section 284.7 apply only to transportation under Subparts B, G and H and not to transportation by intrastate pipelines under Subpart C. The final rule retains the pre-existing rules regarding rates for Subpart C transportation. See section 284.123. In essence, there have been no real concerns with transportation by intrastate pipelines and therefore there is no need to modify the current rules.

With regard to the comment that the non-discriminatory access condition violates section 602(b), we note that the NGPA does not define "common carrier." Section 602(b) has scant legislative history. The only mention of the purpose of section 602(b) in the Conference Agreement merely states that the House bill had provided that "the intrastate pipeline would not have been subjected to regulation as a common carrier . . . ."[25] The Commission notes that Congress did not directly authorize section 311 transportation but gave the Commission the discretion to authorize such transportation under such terms and conditions as the Commission might prescribe under sections 311(c) and 501(a) of the NGPA.[26]

[JA 361]

All the Commission is doing here is ensuring that where a new entity enters into the field of offering interstate transportation services, that it do so on a non-discriminatory basis. We cannot accept the premise that section 602(b) is a Congressional license to "intrastate pipelines" to enter into the field of interstate commerce on an avowedly discriminatory basis. Whatever else the prohibition regarding "common carriage" status may do, it does not sweep so broadly as to license unduly dis-

criminatory rates or practices.[27] The same conclusion applies to interstate pipelines operating under section 311.

Further, it appears from the legislative history of the NGPA that the Commission's conditioning authority under NGPA sections 311(c) and 501(a) is coextensive with the broad discretion granted to the Commission under section 7(c) of the NGA.[28] Section 311(c) must be read in light of the fundamental intention of the NGPA to facilitate the movement of gas between the intrastate and interstate markets following a period of severe curtailment of interstate supplies coincident with ample intrastate supplies.[29]

Hence, the Commission has determined that the non-discriminatory access condition does not violate section 602(b).

The Commission emphasizes that it fully respects the bounds of its jurisdiction under section 1(b) of the NGA as reaffirmed by section 601(a)(2)(A) of the NGPA. The Commission does not intend that any aspect of the final rule intrude in any way whatsoever on the sound discretion of the states to regulate strictly [JA 362] intrastate transactions in the public interest. Nor does the Commission intend the final rule in any way whatsoever to impair the ability of intrastate pipelines to provide reliable service to their intrastate customers.

3. *The reasonableness of the non-discriminatory access condition.*

Comments

Some commenters complain that the non-discriminatory access condition is unreasonable, and therefore not authorized under law or otherwise appropriate, because it would interfere with pipelines' ability to make necessary and appropriate business decisions such as choosing a product/market mix of transportation and sales services, or declining to provide transportation services that would impair

their ability to meet their obligations to existing sales customers.[30] Intrastate pipelines state that the non-discriminatory access condition could potentially affect their ability to provide services in the intrastate market. Several commenters suggest that the harm to the reliability of existing services to pipeline customers would outweigh the benefits of the non-discriminatory access condition to new transportation customers.[31]

Some industrial end-users state that the imposition of the non-discriminatory access requirement on intrastate pipelines is unreasonable because most state agencies already have authority with respect to intrastate pipelines to accomplish the Commission's goal in proposing the condition. These commenters point to New [JA 363] Mexico and other states that have enacted or are considering statutes that require non-discriminatory gas transportation.

One industrial end-user, Air Products, argues that the Commission's proposal to apply the non-discriminatory access provision to intrastate pipelines would diminish the interstate-intrastate pipeline integration achieved since enactment of the NGPA. Lack of system integration would hinder the ability of interstate pipelines and their customers to gain access to reserves connected to intrastate pipelines. According to Air Products, the undesirable effects would result because intrastate pipelines would rather forego NGPA section 311 transportation altogether than expose all of their intrastate operations to possible Commission jurisdiction.

Other commenters, such as Oklahoma Natural Gas Company, suggest that the Commission revise the proposals to specifically limit application of the non-discrimination and firm transportation requirements to an intrastate pipeline's excess capacity in order to reassure intrastate pipelines and state regulatory agencies that the Commission will not intrude on local activities beyond its jurisdiction.

On the other hand, commenters supporting the non-discriminatory access condition assert that the condition is reasonable and absolutely necessary in order to ensure access, by pipeline customers and other shippers, to competitively priced gas supplies at the wellhead. They point to the proliferation of individual pipeline transportation programs and the expanded flexibility of [JA 364] the program proposed by the rule as direct benefits to pipelines which agree to the non-discriminatory access condition. Finally, they point to the history of pipeline gas purchasing practices over the last 30 years as justification for requiring pipelines who transport for others to do so on a non-discriminatory basis for all consumers.[32]

Commission Response

With regard to *intrastate* pipelines, we repeat what was stated above: intrastate pipelines are under no requirement to offer firm service under Subpart C, and the non-discriminatory access condition will apply only to the intrastate pipeline which provides "such" interruptible or firm service. Thus, where an intrastate pipeline offers only interruptible services, the access condition can in no way adversely affect its ability to provide firm service to intrastate customers.

With regard to *interstate* pipelines, the condition is also reasonable. First, the actual condition is voluntary. There is no requirement under the statutes or the rules that an interstate pipeline provide transportation under the self-implementing regulations. Moreover, the condition imposes, verbatim, the statutory ban against undue discrimination. The access condition, therefore, must be included in certificates and self-implementing transportation agreements in order to assure that gas supplies and transmission services are provided as broadly as possible in response to new demands from consumers and new competition in gas markets.

* * * *

EXCERPTS FROM ORDER NO. 436-A

[JA 1079]

The Commission considered most of the arguments raised by the applicants which suggest that the Commission lacks legal authority to apply the non-discriminatory access condition to interstate transportation under the NGA prior to issuing Order No. 436. Further, the Commission reviewed the requirements of the NGA, the legislative history of the NGA, and relevant case law.

Section 7(e) of the NGA, which was added as an amendment to the act in 1942, states, in pertinent part, that:

> The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

According to the Supreme Court:

> The Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges . . .
>
> . . . In view of this framework in which the Commission is authorized and directed to act, the initial certification of a proposal under § 7(e) of the Act as being required by the public convenience and necessity becomes crucial. This is true because the delay incident to determination in § 5 proceedings through which initial certificated rates are reviewable appears nigh interminable.[30]

Thus, as stated by the Commission in Order No. 436 (at Section IV.A.), the Commission's certificate and con-

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[30] Atlantic Refining Co. v. Public Service Commission of New York, 360 U.S. 378, 388-89 (1959) (CATCO).

ditioning authority is the means by which it effectuates the purpose of the [JA 1080] NGA to underwrite just and reasonable rates to the consumers of natural gas.[31] Any attack on a condition in a certificate issued by the Commission must confront the well-established principle that generally the Commission has extremely broad authority to condition certificates of public convenience and necessity.

While determined to use the full breadth of its section 7 conditioning authority to end discriminatory transportation practices and thereby fulfill its obligation under sections 4 and 5, the Commission recognized that its actions could neither directly nor indirectly impose common carrier obligations on pipelines in violation of the NGA.[32]

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[31] *Id.* at 389.

[32] An important factor in the Commission's determination that it does not have the authority to mandate common carriage was the legislative history of sections 303 and 304 of Title III of H.R. 5423 which was introduced on February 6, 1935, (74th Congress 1st Session) by Representative Sam Rayburn, Chairman of the House Committee on Interstate and Foreign Commerce.

Sections 303 and 304 of H.R. 5423 provided in pertinent part (emphasis added):

> Section 303(a). *It shall be the duty of every distributor to* furnish natural gas, to exchange natural gas with, and *transmit natural gas for any person* upon reasonable request therefor; and to furnish and maintain such services and facilities as shall promote the customers, employees, and the public, and shall be in all respects adequate, efficient and reasonable . . .
>
> Section 304. Whenever the Commission after notice and opportunity for hearing finds such action necessary or desirable in the public interest, *it may by order direct a distributor* to make additions, extensions, repairs, or improvements to or changes in its facilities, to establish physical connection with the facilities of one or more persons, to permit use of its facilities by one or more persons, or utilize the facilities of, sell natural gas to, purchase natural gas from, *transmit natural gas for,* or exchange natural gas with *one or more other persons* . . .
> . . . [T]he Commission may prescribe the terms and conditions

Further, the condition only applies with regard to each of the individual types of Order No. 436 transportation service offered. Therefore, for example, an interstate pipeline may transport under the Part 284, Subpart G blanket certificate program without becoming subject, by reason of such blanket certificate transportation, to an obligation to provide service under Subpart B of Part 284 and [JA 1081] vice versa. Further, the non-discriminatory access provisions of §§ 284.8(b) and 284.9(b) *per se* do not cover transportation under existing individual section 7 certificates or new individual section 7 certificates filed outside of the optional expedited certificate procedure.

The Commission agrees with those petitioners that state that the court's mandate in *Maryland People's Counsel v. FERC*, 761 F.2d 768 and 768 F.2d 780 (D.C. Cir. 1985), was not intended to require that the Commission adopt mandatory carriage regulations. In any event, the Court's mandate clearly did judicially recognize all that is necessary for present purposes, that is the Commission [JA 1082] has the authority to impose non-discriminatory access conditions on pipeline transportation.[33]

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of the arrangement to be made between such persons, including the apportionment of reimbursement reasonably due to any of them.

Section 303 and 304 must be read in the context of sections 4(b) and 5(a) of the NGA as enacted. In contrast to the affirmative duty of unenacted section 303 of H.R. 4523, section 4(b) of the NGA flatly prohibits "any undue preference or advantage" and "any reasonable difference" in service or as between classes of service. In contrast to the discretionary proposed authority in unenacted section 304 of H.R. 5423 to *order* transportation, section 5(a) of the NGA contains *no express authority to order transportation.* Instead, section 5 limits the Commission to fixing prospectively by order the "just and reasonable . . . rule, regulation, practice or contract" to be observed.

[33] In its order on the blanket certificate program (No. 84-1090), the court noted (761 F.2d at 789 n.19) that MPC's plea that blanket transportation certificates be conditioned on non-discriminatory

The Commission determined that the non-discriminatory access conditions in Order No. 436 did not amount to a "direction" or a "mandate" to pipelines to transport for others as an "affirmative [JA 1083] duty" because the condition is only a condition. As it stated in the order: "a *condition* on the certification or authorization of certain self-implementing transportation services which a pipeline may *voluntarily choose to perform or not*, strictly at its own option." Thus, Order No. 436 does not "direct" or 'mandate" a pineline to do anything. Further, the non-discriminatory access condition, even when accepted by a pipeline as part of its self-implementing transportation program, does not impose any "affirmative duty" on a pipeline to transport. It only requires that when a pipeline *does* choose to transport on a self-implementing basis, it must provide those transportation services in a non-discriminatory manner. Nor does the condition cover all transportation services and thus operate as mandatory *in effect*. A pipeline remains free to seek authorization for other transportation not covered by the condition and the Commission will review them on a case-by-case basis.[34]

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access accords with the recommendation of the Department of Energy: "To achieve the benefits of a properly developed spot market for natural gas . . . FERC should use its authority over natural gas transportation to require pipeline companies to provide carriage on a non-discriminatory basis whenever there is idle pipeline capacity." Second DOE Section 123 Report at p. 82. The court further noted that the Commission does not question that it has such authority, *citing* Tennessee Gas Pipeline Co. v. FERC, 680 F.2d 212, 214-15 (D.C. Cir. 1982); Transcontinental Gas Pipeline Corp. v. FERC, 589 F.2d 186, 190 (5th Cir. 1979) (invoking "the well-established principle that generally the Commission has extremely broad authority to condition certificates of public convenience and necessity"), *cert. denied*, 445 U.S. 915 (1980).

[34] Several petitioners argue that Order No. 436 is similar to regulatory programs rejected by the courts in Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970) and Consolidated Edison Company of New York v. FPC, 511 F.2d 372, 377 (D.C. Cir. 1974). The Com-

[JA 1084]

Furthermore, the Commission is not dissuaded by the comparisons made by several petitioners including, e.g., NGPL (at pp. 12, 28) and City of Willcox, Arizona (at p. 35), between Order No. 436 and the legislative proposals to mandate common-carriage transportation that have been considered, but not enacted by Congress over the years. Nor does the Commission believe that Order No. 436 is inconsistent with section 602(b)(2) of the NGPA, which provides that no person shall be subject to regulation as a common carrier by reason of any transportation authorized under section 311(a) of the NGPA. In the first place, the Commission notes that neither the NGA nor the NGPA defines "common carrier." Nevertheless, the provisions of Order No. 436 do not regulate pipelines as common carriers, as that term is commonly understood.[35]

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mission does not believe these cases are germane in this instance. In *Moss* the Civil Aeronautics Board failed to comply with the public notice and hearing requirements of the Federal Aviation Act in prescribing a fare formula for domestic airlines. Moreover, the court found that the formula actually amounted to a prescription of rates, because the Board admitted that the pressures on carriers to file conforming rates was "great if not irresistable." In a similar vein, the court held in *Consolidated Edison* that if end-use curtailment plans were not filed voluntarily by pipelines but were the result of coercion by the Federal Power Commission the plans would be invalid, because the Commission could not impose a change on an existing tariff without complying with section 5 of the Natural Gas Act.

Neither of these cases applies to the circumstances of Order No. 436. In the first place, Order No. 436 was issued in compliance with applicable rulemaking procedures, which involved extensive public participation. Moreover, as the Commission has already explained, the self-implementing transportation program is voluntary and indeed alternative authority is fully available under traditional Natural Gas Act procedures.

[35] Since Order No. 436 does not have the effect of imposing common carriage status on contract carriers, cases cited for the

[JA 1085]

For instance, even though Order No. 436 requires, as the cited legislative proposals would have required, nondiscriminatory access, the all-important distinction is that Order No. 436 allows a pipeline the option of applying to provide transportation services under individual NGA section 7 certificates. Order No. 436 also gives a pipeline that has opted for self-implementing transportation the opportunity to cease such transportation and resume its status as a merchant. None of the mandatory common-carriage proposals considered heretofore by Congress have included any equivalent option. While a transportation application under the regular NGA section 7 procedures is open to challenge on the grounds that approval of the application would result in undue discrimination, only the individual transportation arrangement covered by the pipeline's applications is at issue in a regular NGA section 7 certificate proceeding and, therefore, denial of a certificate in that proceeding does not prejudice certificate applications by the same pipeline in other proceedings. This option, unlike the legislative proposals for common-carriage, effectively allows a pipeline the discretion to determine whether or not to become a transporter of gas. Further, while allegations of unduly discriminatory effects will be considered in regular NGA section 7 transportation certificate proceedings, a regular NGA certificate is not conditioned on a pipeline's providing transportation to all shippers requesting service. For example, if the Commission should determine that approval of a regular NGA section 7 transportation certificate application would cause undue [JA 1086] discrimination to another party, the discrimination could be cured by an amendment to the application as it affects a particular additional shipper.

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proposition that only Congress can impose that status (FCC v. Midwest Video Corp., 440 U.S. 689, 702-09 (1978) and Florida Power and Light Co. v. FERC, 660 F.2d 668 (5th Cir. 1981) are not applicable.

The Commission cannot agree with those applicants that insist that it is not unduly discriminatory for a pipeline that transports gas to refuse to transport gas that displaces the pipeline's sales. This is precisely what the court found objectionable in *Maryland People's Counsel v. FERC*, 761 F.2d 780 (D.C. Cir., 1985). Pipelines that were willing to transport gas for their fuel-switchable customers were not required to transport for their captive sales customers that were incapable of switching fuels.

2. *Effects of Non-Discriminatory Access*

a. *On Order No. 319 Transactions*

Certain of the applications for rehearing request that the Commission amend the final rule to allow new transactions to provide transportation for local distribution companies and high-priority end users, previously authorized under NGPA § 311 and Order Nos. 319 and 60, to continue to be made without requiring interstate pipeline companies to provide non-discriminatory access. Philadelphia (passim), CIG (at pp. 25-28) and BUG (at pp. 3-8) assert that the access condition is inconsistent with the NGPA and is not required by the *Maryland People's Counsel* decisions of the D.C. Court of Appeals. Huffco (at pp. 17-18) contends that certificates for the transportation of gas to high-priority end users are required to be issued by section 7(c)(2) of the NGA.

[JA 1087]

Existing transportation for high-priority end users that had been authorized under § 157.209(a) of the regulations has been permitted to continue for the term of the transportation arrangement, subject to the terms and conditions existing at the time it was authorized. *See* § 284.223(g). New high-priority end-user transportation, section 311 transportation for intrastate pipelines and local distribution companies, transportation for end users

under § 157.209(e), and transportation for interstate pipelines, are subject to the express requirement that the transporting pipeline provide non-discriminatory access for all shippers and the various other requirements of § 284.7 *et seq.* The Commission has determined that the practice of restricting access to transportation is unduly discriminatory and preferential and has prevented consumers from obtaining the lowest reasonable rates for both gas and transmission. With that determination, and in view of the many other reasons expressed in the final rule for requiring open access for future transportation, it would be inconsistent with the whole rationale underlying the final rule (and, in the Commission's view, with the rationale underlying the *Maryland People's Counsel* cases as well) to permit new transactions to be initiated for service without adherence to the requirements of the final rule.

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